

# Protecting Injured Immigrant Workers From Retaliation

*Under the new federal administration, unscrupulous employers and their insurers have been emboldened to retaliate against workers filing claims for workers' compensation, and there have been a number of recent reports of illegal targeting of and retaliation against undocumented workers.*

- Under a Florida law, at least [130 injured](#) workers have been arrested and put at risk of deportation rather than paid workers' compensation.
- In Massachusetts, a seriously injured worker was arrested by [Immigration and Customs Enforcement \(ICE\)](#) at a meeting with his employer about his recently filed workers' compensation claim.

*This document provides general information on injured workers' rights and actions to take to help ensure injured workers' rights are upheld, regardless of their immigration status.*

## **Injured Undocumented Workers Have a Right to Workers' Compensation**

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Almost every state, either explicitly or implicitly, includes undocumented workers in their workers' compensation statutes. There are specific agency or court decisions in 36 states, plus the District of Columbia (AL, AZ, AR, CA, CO, CT, DE, FL, GA, ID, IL, IA, KS, KY, LA, MD, MA, MI, MN, NC, NV, NH, NJ, NM, NY, NC, OH, OK, OR, PA, SC, TN, TX, VA, WA, WI) finding that undocumented workers are included in the definition of "employee" in their state workers' compensation laws. Since the language in most statutes is nearly identical, undocumented workers should be covered by workers' compensation in the remaining states. (Undocumented workers are explicitly excluded from workers' compensation by statute only in Wyoming, and then only if they are both unauthorized to work and their employer failed to follow the I-9 employment authorization verification process).

## **Injured Workers' Right to Protection against Retaliation**

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### **State Workers' Compensation Laws**

Most workers' compensation [state laws](#) expressly prohibit retaliation or discrimination for filing a workers' compensation claim. In many states, it is illegal to discharge, threaten, or in any manner intentionally obstruct an employee seeking workers' compensation benefits.

### **The Occupational Safety and Health Act**

Injured workers have the right under the Occupational Safety and Health Act (OSH Act) to report an injury [without fear of retaliation](#) or discrimination by their employer. For many workers, filing a workers' compensation claim is reporting an injury.

The Occupational Safety and Health Administration (OSHA) clearly states this in a [2012 memorandum](#) :

“If employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk. Employers do not learn of and correct dangerous conditions that have resulted in injuries, and injured employees may not receive the proper medical attention, or the workers' compensation benefits to which they are entitled. Ensuring that employees can report injuries or illnesses without fear of retaliation is therefore crucial to protecting worker safety and health.”

There is a section in the OSH Act, as well as a new regulation issued pursuant to the law, that protects a worker's right to report an injury:

- [Section 11\(c\)](#) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. 29 CFR 1904.36. In fact, reporting a work-related injury or illness is a core employee right under the OSH Act, and retaliating against a worker for reporting an injury or illness is illegal discrimination under Section 11(c).
- In December 2016, OSHA promulgated a new rule (which all state-run OSHA's have since adopted), 29 CFR 1904.35(b)(1)(iv), that explicitly incorporates the Section 11(c) prohibition on retaliation against employees for reporting work-related injuries and illnesses. The purpose of this new provision in Section 1904.35 is to allow OSHA to issue citations to employers who retaliate against their employees for reporting an injury or illness. This is a new and important rule because it gives OSHA the ability to protect workers who have been subject to retaliation for reporting work-related injuries or illnesses, even when they cannot or will not speak up for themselves by filing a Section 11(c) complaint.

### **Additional Policies to Protect Injured Workers Who Are Victims of Unlawful Immigration-Related Retaliation**

- A longstanding [federal immigration policy](#) states that immigration agents should not interfere in a labor dispute. [An updated version of the guidance](#) includes I-9 inspections. Both refer explicitly to compensation for work-related injuries.
- A [memorandum of understanding](#) (MOU) from 2011, between ICE and the U.S. Department of Labor (DOL), which applies to OSHA, outlines the [two agencies'](#) commitment to ensure coordination to protect workers who are exercising their labor rights against retaliation by employers and other parties who use the threat of immigration enforcement.
- Workers may be entitled to [deferred action](#), a temporary protection against deportation, or a [U visa](#), which allows certain crime victims to legally remain in [the U.S.](#)

### **How Workers' Compensation Lawyers Can Protect Clients from Retaliation**

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#### **Preventing Retaliation**

- Attorneys should always advise clients of their right to workers' compensation, no matter what their immigration status, and that they should notify the attorney if there is any threat of retaliation by the employer or the insurer.
- In initial interviews, clients should also be given palm cards explaining their right to remain silent, available to download from the [National Immigration Law Center](#).

- Consider arming clients with a letter from you that they can present to immigration authorities, indicating that they have a right to workers' compensation, that authorities should not question the individual, and that all questions should be referred to you.
- In addition, attorneys should be mindful that some agencies might ask for unnecessary information when a worker applies for compensation. Attorneys should advise the worker to never supply incorrect information, such as an incorrect Social Security number, to the agency.
- Consider asking the state workers' compensation agencies to allow your client to video chat into meetings or hearings on their claim.
- If, at any time, the employer threatens retaliation against the worker, inform the employer that it is illegal to retaliate against workers in any way for reporting an injury and filing a workers' compensation claim, and that doing so could result in federal and state investigations. Supply the company with a copy of the ICE guidance.

### **What Workers' Compensation Lawyers Can Do If Retaliation Occurs**

A number of retaliation scenarios might present themselves. First, ICE could appear at official legal proceedings after having been tipped off by the employer or her insurance carrier. ICE could come to a worker's home, with or without a warrant for arrest. Or the company may report workers to local prosecutors, claiming that they have committed a crime. As always, clients should be advised of their right not to give any information to police or immigration authorities.

#### If ICE agents appear at a deposition or other hearing where you are present:

- Advise them that your client is fully entitled to workers' compensation and that federal policy prevents them from interfering in the worker's exercise of her rights. Since many ICE agents are not familiar with the ICE guidance on interference in labor disputes, give them a copy, and ask them to stand down in compliance with it.
- At no time should attorneys make representations about a client's immigration status. They should leave that to the client's immigration attorney. You in no way want to imply or acknowledge that your client may be undocumented.

#### If a client has been apprehended by local police in an attempt to interfere with her workers' compensation claim:

- Facilitate client's access to a criminal defense attorney.
- Ensure that the client understands any immigration consequences that may flow from pleading guilty to a criminal offense.

#### If a client has been apprehended by ICE in an attempt to interfere with her workers' compensation claim:

- Facilitate client's access to an immigration attorney.
- Ensure that the worker is interviewed by a competent entity to determine whether she has a claim for U visa protection or deferred action status.
- Contact ICE and supply them with a copy of the [Department of Homeland Security \(DHS\) Guidance](#) (the MOU between DHS and DOL) that says immigration authorities will not be involved in labor disputes.

## **In All Cases, Workers' Compensation Attorneys Should File Complaints Immediately with OSHA as Follows:**

### File an OSHA discrimination complaint (a Section 11(c) complaint) immediately:

- The Section 11(c) complaint should describe the retaliatory action taken—including that ICE was tipped off in an attempt to retaliate after the worker reported an injury and filed a compensation claim.
- This complaint needs to be filed immediately (though, legally, a worker has 30 days to file the complaint).
- If you are in a state with a state plan OSHA, such as Minnesota, you can file both with the state and federal OSHA. [You can file online here.](#) This is the easiest way to get the complaint to OSHA, but you can also email or call state OSHA's in state plan states with the complaint.
- Note: The OSH Act covers all employees and you do not need to acknowledge or imply anything about the status of your client.

### File a signed OSHA safety and health complaint immediately:

- The safety and health complaint should describe that the employer violated OSHA standard 1910.135 in that they illegally retaliated against a worker for reporting a serious injury.
- Explain the retaliatory ICE enforcement action taken as a result of your client reporting an injury and filing a workers' compensation claim.
- You, as the attorney, can file and sign this on behalf of a worker.
- Also, you could add information about any safety violation or hazardous condition that existed and that may have caused the injury (including lack of training).
- To ensure the complaint will be taken seriously and result in an onsite investigation, you must [sign the complaint](#).

### Follow up on the filing of the OSHA complaints:

- Call the local [area or regional OSHA office](#). Let them know that a complaint has been filed alleging a retaliatory ICE enforcement action taken as a result of the worker exercising his/her labor rights—and remind them of the memorandum of understanding between the two agencies (ICE and DOL).
- Make it clear that your client's workplace rights have been threatened.
- In [some states](#) that have state-run OSHA offices, you should call both the head of the state OSHA as well as the regional director in federal OSHA (who provides oversight to the state agency).

### File a complaint with the state workers' compensation agency:

- If the state workers' compensation law contains a clause prohibiting retaliation or discrimination for filing a workers' compensation claim, file a complaint immediately with the state workers' compensation agency.
- When filing this complaint, you do not need to acknowledge or imply anything about the immigration status of your client.

## What if the Employer Does Not Carry Workers' Compensation?

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If the employer is legally required to carry workers' compensation and does not carry workers' compensation, file a complaint with the state workers' compensation administration (or in some cases the attorney general's office in your state). In many states, the state workers' compensation agency has the power to fine the employer and order them to pay for the necessary workers' compensation coverage.

In every state but Texas, employers must carry workers' compensation. In a few states, some industries are exempt, and in others, there are some size restrictions on the size of employers who are required to carry workers' compensation. You can check your state law here: <http://www.nelp.org/workers-comp-law-resources/>.

## Other Actions to Take

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Workers' compensation attorneys are also urged to meet with their state's workers' compensation administrators, ICE district directors, and the [OSHA office](#) nearest to you to ensure that everything is done to protect a worker's right to file and receive workers' compensation for injuries and illnesses.

If your client experiences retaliation, connect with an immigration lawyer and an experienced employment and civil rights litigator in your area so you can all work together to protect workers and their rights.

For more information, or to answer any questions, contact Debbie Berkowitz at [dberkowitz@nelp.org](mailto:dberkowitz@nelp.org) or Becki Smith at [rsmith@nelp.org](mailto:rsmith@nelp.org). Please also let us know about instances where your clients have been targeted by ICE.